STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B033**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KIT R. CARVER,

Complainant,

vs.

DEPARTMENT OF REVENUE, MOTOR CARRIER SERVICES DIVISION,

Respondent.

Administrative Law Judge ("ALJ") Denise DeForest held the hearing in this matter on February 27, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ at the conclusion of the hearing. Assistant Attorneys General Michelle Brissette Miller and Michael Scott represented Respondent. Respondent's advisory witness was Kirstie Nixon, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Kit R. Carver ("Complainant") appeals his/her termination by Respondent, Department of Revenue, Motor Carrier Services Division ("Respondent"). Complainant seeks reinstatement, an award of back pay, and the substitution of a corrective action for the disciplinary action.

For the reasons set forth below, Respondent's action is **affirmed.**

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant has been certified as a Port of Entry Officer I since 2005, and was based at the Cortez, Colorado, Port of Entry facility.

2. As a Port of Entry Officer I, Complainant was a peace officer with the power to detain trucks and drivers who were in violation of state code. Complainant's job duties included that he verify the compliance of drivers and trucks with applicable with laws, rules and regulations through an inspection process. Port of Entry Officers are authorized to declare a driver and/or vehicle out of service for violation of the law. Officers are also expected to testify in judicial proceedings in support of penalty assessments or summons, or in other judicial proceedings as official representatives of the agency.

Sick Leave Incident

3. Complainant was scheduled for vacation beginning September 21, 2007. He planned to take his vacation in Hawaii.

4. Complainant arrived at work on September 10, 2007, with a goatee that violated the Dress Code Policy. (Stipulated Fact) Complainant was advised that the goatee violated the policy and he reported to the next shift clean-shaven. (Stipulated Fact)

5. During the day on September 18, 2007, Complainant's supervisor, Howard Kaime, noticed that Complainant was beginning to show signs of a goatee again. Mr. Kaime thought that Complainant had been fully informed about the issue from the previous time that Complainant had started a goatee, and he called Complainant into his office.

6. In that meeting, Complainant told Mr. Kaime that he understood that the dress code did not permit facial hair, but he was due to go on vacation in Hawaii in a few days and he wanted to start growing a goatee early just to see how it looked. (Stipulated Fact)

7. Mr. Kaime told Complainant during that meeting that he had to be clean-shaven by the time of his next shift, which was September 19, 2007.

8. During the morning of September 19, 2007, Complainant called into work. He explained that he was sick and was not going to be at work that day.

9. In the evening of September 19, 2007, Complainant called in sick for the next day. During this conversation, Complainant explained that he was still sick and on antibiotics.

10. Mr. Kaime suspected that Complainant's sick leave request may be related to the fact that Complainant was due to start his vacation in Hawaii the following day. Mr. Kaime also suspected Complainant may be using sick leave in preparation for his vacation

because Complainant had called in sick on either the day before or the day after Complainant was off work on more than seven occasions in 2006 and 2007. Mr. Kaime had not brought his concerns about Complainant's use of sick leave to Complainant's attention by September 19 and 20, 2007.

11. Mr. Kaime called Complainant at home during the morning of the 20th, told Complainant that his shift would be covered, and told Complainant that he needed to present a doctor's note for the sick leave use.

12. Complainant told Mr. Kaime that he had obtained antibiotics in Mexico and had not gone to a doctor. Mr. Kaime told Complainant that Complainant still needed to present a doctor's note, and that going to the doctor after his return from Hawaii would not suffice.

13. Complainant interpreted Mr. Kaime's requirement to be that he had to present a doctor's note that day.

14. Complainant's roommate had gone to the doctor for a sinus infection earlier in the week. Dr. Alison Jackson of the Durango Family Medicine office had originally issued a doctor's excuse to Complainant's roommate.

15. Complainant had the excuse issued to his roommate altered so that it appeared to be dated September 20, 2007, and so that it appeared to excuse Complainant from work on September 19 and 20 because he was ill.

16. Complainant drove to the Cortez Port of Entry to provide Mr. Kaime with the altered doctor's note. He made a copy of the altered note and provided Mr. Kaime with the copy.

17. When Mr. Kaime examined the note after Complainant had left the office, he discovered that the note appeared to be altered, with a handwriting difference between the handwriting on Complainant's name and the dates and the remainder of the note. Mr. Kaime also observed that the spacing around the dates appeared to be different than the spacing on the remainder of the note.

18. Mr. Kaime contacted Deputy Chief Dan Wells about the doctor's note that Complainant had provided to him. Mr. Wells brought the issue to the attention of the Director of Motor Carrier Services Division, Kirstie Nixon.

Respondent's Investigation

19. Ms. Nixon and Mr. Wells examined the fax of Complainant's doctor's excuse and determined from the odd spacing of some of the text, the different handwriting in certain critical parts of the note, and from other indications that the note was likely to be falsified.

20. Ms. Nixon instructed Mr. Kaime to tell Complainant to bring in the original note. Ms. Nixon hoped that such a requirement would force Complainant to admit that his note had

been altered.

21. Mr. Kaime called Complainant and told him to submit the original note. Complainant arrived at the Cortez Port of Entry about a half-hour later and provided Mr. Kaime with a copy of the same altered note which had been cut down to a prescription pad size.

22. Ms. Nixon also had staff make inquiries with Dr. Johnson's office to determine if the note had been issued in Complainant's name. Dr. Johnson's office denied that it had issued a note to Complainant.

23. Ms. Nixon decided that Complainant should be placed on paid administrative leave pending the investigation into the submission of the note.

Board Rule 6-10 Meeting

24. Mr. Kaime called Complainant into his office upon Complainant's return from vacation and placed Complainant on paid administrative leave pending an investigation. A Board Rule 6-10 meeting was also scheduled for October 9, 2007 for the purpose of discussing Complainant's job performance, including "your submittal of a doctor's excuse that appears to be fraudulent."

25. Ms. Nixon and Mr. Wells met with Complainant for the Board Rule 6-10 meeting on October 9, 2007.

26. During the Board Rule 6-10 meeting, Complainant told Ms. Nixon that Mr. Kaime's requirement that Complainant submit a doctor's excuse gave him no choice but to provide an altered doctor's excuse. (Stipulated Fact) Complainant explained that he had contacted doctors in the area and had not been able to get an appointment after Mr. Kaime had told him that he had to submit a doctor's excuse.

27. Complainant admitted during the meeting that he had asked someone to alter the note that his roommate had obtained.

28. Complainant denied that he had ever abused his sick leave. He explained that he would have more sick leave time if his supervisor had not required him to take a sick leave day when Complainant asked for a vacation day to go hunting.

Disciplinary Action

29. In deciding whether to impose discipline, Ms. Nixon considered that Complainant had no prior disciplinary or corrective actions. She also reviewed Complainant's prior performance reviews and was aware that Complainant's reviews had been good.

30. Ms. Nixon was concerned, however, that the position of Port of Entry Officer was a law enforcement position and required Complainant to be able to defend his decisions in

court, if necessary, as part of his enforcement duties. Ms. Nixon considered the submission of an altered doctor's note to be incompatible with those duties. Ms. Nixon also considered Complainant's explanation for why he felt that Mr. Kaime's demand for a doctor's note had given him no choice but to fabricate an excuse as evidence that Complainant was untrustworthy.

31. By letter dated October 18, 2007, Ms. Nixon terminated Complainant's employment.

32. Complainant filed a timely appeal with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. § 24-50-101, *et seq.*, *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 706. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Respondent has proven all of the material facts underlying the disciplinary decision through stipulation or testimony. Complainant admitted through stipulation and testimony that he had asked his roommate to alter a doctor's excuse for him, and that he had submitted that altered excuse to Mr. Kaime.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant's primary argument at hearing was that termination of his employment was not warranted given that this was his first disciplinary infraction. Complainant's argument implicates Board Rule 6-2, 4 CCR 801. Board Rule 6-2 requires:

> A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper.

This provision embodies the Board's progressive discipline requirement. Progressive discipline is a process through which an employer applies a lower level of correction prior to applying higher levels of discipline in order to encourage employees with performance deficits to correct those deficits. The goal of progressive discipline is to improve employee performance rather than punish an employee, and to provide employees with a chance to correct issues prior to the imposition of discipline.

Complainant has no prior discipline or corrective actions for any cause. The question, therefore, is either the act of submitting an altered doctor's note would qualify as "flagrant or serious" so that the imposition of immediate discipline is justified under Board Rule 6-2.

The fabrication of a doctor's note by a law enforcement officer meets the criteria as a flagrant act warranting immediate discipline. Submitting an altered note -- not just once but twice -- is plainly unacceptable behavior for any employee and constitutes willful misconduct. As such, it meets the requirement as a flagrant act. *See* Merriam-Webster 's Collegiate Dictionary, 11th Edition at p. 475 (defining "flagrant" as "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality"). It is not a violation of Board Rule 6-2 to terminate Complainant's employment without having first issued progressive discipline to Complainant.

Complainant additionally argued at hearing that Mr. Kaime had insufficient justification to suspect that his use of sick leave on September 19 and 20 was possible sick

leave abuse. Director's Procedure 5-6, 4 CCR 801, permits an appointing authority to request that an employee provide a medical certificate form, or its equivalent, for health-related absences of fewer than three full consecutive working days when "a pattern of absences indicates possible abuse." Mr. Kaime's decision to require a doctor's excuse was reasonably based upon both Complainant's prior use of sick leave in 2006 and 2007, as well as the circumstances surrounding Complainant's desire to grow a goatee in preparation for his Hawaii vacation. It was not a violation of rule or law for Mr. Kaime to require a doctor's excuse under the circumstances presented in this case.

Finally, Complainant also argued that it was unreasonable and unfair to consider his use of sick leave as a possible breach of sick leave rules because he had previously been told to use a sick leave day in lieu of annual leave. This argument misses the point of the discipline. Complainant was disciplined for falsifying the doctor's note, not for a pattern of sick leave abuse. Any prior use of sick leave instead of annual leave is unconnected and irrelevant to the fabrication of a doctor's excuse.

Respondent made its decision to terminate Complainant's employment after thoroughly reviewing the available evidence and circumstances, and reaching a reasonable conclusion that Complainant had committed willful misconduct by submitting an altered doctor's excuse. Respondent's actions did not violate any rule applicable to this case. Therefore, Respondent's decision to discipline Complainant was not arbitrary, capricious or contrary to rule or law.

C. The discipline imposed was within the range of reasonable alternatives.

Complainant also argued at hearing that, while he admitted that his decision to submit the fraudulent doctor's note was a terrible decision, the decision to terminate his employment was unreasonable because he had no prior disciplinary or corrective action, his performance had been good, and the decision to submit the note was in response to his supervisor demanding that he submit one, even after he had explained to Mr. Kaime that he had not gone to a doctor.

Complainant's argument, at its core, is that Respondent has not taken mitigating circumstances into account in deciding to terminate his employment rather than imposing a less serious level of discipline or corrective action. The evidence at hearing, however, was that Complainant presented these arguments to Ms. Nixon during his Board Rule 6-10 meeting, and that Ms. Nixon did not consider them to provide sufficient mitigation to balance the willful misconduct in this case.

Complainant asserts that Mr. Kaime's insistence on receiving a doctor's note even after Complainant told him that he did not have one placed him in a difficult position. Complainant had to face the possibility that he would be in violation of sick leave regulations because he had no doctor's note. He also faced the possibility that he would have to argue his point to Mr. Kaime and other supervisors, and that he may be found to have been absent without approved leave. The one possibility that Complainant should

have placed completely off-limits, however, was the option of fabricating an excuse. Law enforcement officers exercise a high degree of discretion in their position, and they should be able to consistently demonstrate good judgment in their choices. Ms. Nixon's decision that such conduct was incompatible with Complainant's law enforcement position was a reasonable conclusion.

The credible and persuasive evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The decision to terminate Complainant's employment was within the range of reasonable alternatives available under the circumstances of this matter.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.

2. Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 7th day of April, 2008.

[redacted]

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of April, 2008, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Kit R. Carver
[redacted]

and in the interagency mail, to:

Michelle Brissette Miller
[redacted]

[redacted]

Andrea C. Woods

(rev'd. 5/07)